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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-44

VINCENT ANTHONY FALCONE,

Petitioner,

—V.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming his criminal conviction.

Opinion Below

The opinion of the Court of Appeals is still unreported. It is set forth in Appendix B to this petition. The judgment of the Court of Appeals is set forth in Appendix A to this petition.

Constitutional and Statutory Provisions Involved

(1) The Fourth and Fifth Amendments to the United States Constitution.

(2) 18 U.S.C. §§ 2, 659, 2312 and 2314.

These provisions are set forth in Appendix D to this petition.

Questions Presented

1. Did the search of the truck by agents of the F.B.I. within a few minutes after the Petitioner left this vehicle, violate the Fourth Amendment?

2. Was the trial court correct in its conclusion, upon the suppression hearing, that the action of the Petitioner in taking to the woods after parking the stolen truck, constituted an abandonment of the vehicle and its contents?

3. Was the Court of Appeals correct in concluding that, because a vehicle was involved, less rigorous standards as to probable cause pertained, notwithstanding the fact that the vehicle was unattended, encircled by agents of the F.B.I., and that no exigent circumstances prevailed excusing the normal resort to a search warrant? (see *Coolidge v. New Hampshire,* dec. June 21, 1971, U.S. , 9 Cr. L. 3208).

4. Did the trial court err in failing to instruct the jury that if Petitioner was merely an aider and abettor in the crimes charged, the inference of guilty knowledge relating to the tainted origin of both the truck and its contents could not be drawn against him, but only against his co-defendant as a principal?

5. Did the prosecutor's repeated references to the failure of Petitioner to explain his relationship to the stolen truck and its contents constitute improper comment on Petitioner's failure to testify? Were such comments particularly

improper and prejudicial where Petitioner was under no obligation to rebut inferences of guilty knowledge if the jury viewed Petitioner as a mere aider and abettor?

6. Having ruled that Petitioner's arrest by local police after his flight from the truck was unlawful, and that subsequent statements to local authorities therefore would be suppressed, did the trial court improperly advise the jury that Petitioner had made an incriminating post-arrest statement?

Statement of the Case

1. Introduction

Petitioner and his co-defendant, D'Avanzo* were each convicted on December 4, 1970 in the Federal District Court for the Eastern District of New York, (Zavatt, U.S.D.J.), after a jury trial upon three counts for violations of Title 18 U.S.C., §§ 659, 2312, 2314, and 2. Prior to their trial, the District Court conducted a lengthy suppression hearing which terminated with a finding sustaining a seizure by F.B.I. agents of a stolen truck and its contents upon grounds of probable cause and abandonment. The District Court's oral decision on this phase of the case is set forth in Appendix C.

The charges against Petitioners related to their alleged possession and transportation in interstate commerce of a quantity of mercury stolen by unknown persons from a shipment consigned from Mexico to India which required transshipment through the Port of New York. While the

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* We are advised that the co-defendant D'Avanzo intends to file his own petition for a Writ of Certiorari. We, therefore, advert to both defendants in this Court as "petitioners".

merchandise was being trucked by a tractor-trailer from a pier in Staten Island to another pier in Brooklyn for reloading, the mercury shipment (400 cylinders worth $200,000.00) was hijacked, and the emptied tractor-trailer was soon thereafter abandoned in Brooklyn. Two days later, Petitioners were allegedly observed by agents of the F.B.I. driving from Staten Island to Watertown, Connecticut in an International dump-truck from which 326 of the stolen mercury cylinders were later recovered. The dump-truck allegedly utilized by Petitioners to make this interstate trip was, likewise, claimed to have been stolen.

Under Count One of the Indictment both Petitioners were convicted for possessing mercury stolen from a trailer shipment consigned in foreign commerce (18 U.S.C., § 659). Under Count Two, both Petitioners were convicted for violating 18 U.S.C., § 2312 for having transported a stolen vehicle, an International dump-truck, in interstate commerce. With respect to Count Three, both Petitioners were convicted for transporting stolen mercury in interstate commerce (18 U.S.C., § 2314).*

Petitioner Falcone was sentenced to concurrent prison terms (18 U.S.C., § 4208 a-2) of five (5) years under Counts One and Three. Upon Count Two, sentence was suspended but Falcone was placed upon probation for a term of three years to be commenced upon completion of his term of imprisonment.**

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* A fourth count charging receiving and concealing goods stolen from foreign commerce (18 U.S.C. § 2315) was dismissed by the trial court on its own motion at the end of the entire case.

** Petitioner D'Avanzo received a ten year prison term. Both Petitioners are presently on bail.

2. The Government's Case

(a) *Proof of the hijacking; the consignment of goods in Foreign Commerce*

The evidence established that on June 3, 1969, various unknown persons successfully commandeered a tractor-trailer in Staten Island, New York, loaded with flasks of mercury destined for consignment to India (Tr. 226-7, 234-5, 615 et seq.).* The shipment had originated in Mexico and required reloading from a Staten Island pier to a vessel scheduled for departure from a dock in Brooklyn (Tr., *id.*; 606-626). The record is bereft of any proof that Petitioners participated in the hijacking, nor is any claim whatsoever made by the Government that Petitioners functioned in any way except as intermediate receivers (See Opinion of Court of Appeals, Appendix B, p. A4). While the hijacked truck was recovered not long after the theft, and its gas gauge showed that it had not travelled very far, the mercury shipment was missing.

(b) *The search for the missing mercury*

On June 5, 1969, two days after the hijacking, a team of F.B.I. Agents operating in Staten Island placed a late model International truck bearing Petitioner's name on its side door under surveillance (Tr. 254, 263-4, 298 et seq. 419). Suspicion focused upon the truck because it sat so heavily upon its axle, because Petitioner had been a suspect in connection with a similar theft of mercury which had taken place eight months earlier, (Tr. 264; H. 185-187),**

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* References to the minutes of the transcript of the trial are cited as "Tr. - - -".

** References to the minutes of the suppression hearing are cited as "H. - - -".

and because Petitioner operated a scrap-metal yard not far from the scene of the June, 1969 hijacking (H. 185).

Little more than one hour after the F.B.I. surveillance had been set up, the suspect truck commenced a trip which coursed directly through New Jersey, New York and into Watertown, Connecticut, where the vehicle pulled to a halt in a residential *cul de sac,* the lights of the truck were doused, and the Petitioners took to the woods—with several F.B.I. agents in mufti not far behind (Tr. 270, 301 et seq.; 357). The record allows for no serious dispute that Petitioner D'Avanzo had been seen driving the truck and that Petitioner Falcone was observed sitting alongside of him in the front seat (Tr. 301-304, 351).* Both Petitioners were also observed at various stops along the route where D'Avanzo was seen placing telephone calls (Tr. 302, 305).

(c) *The Abandonment of the International Truck; the Apprehension of Petitioners*

From the testimony of the F.B.I. Agents, it may fairly be inferred that the occupants of the truck had reason to believe they were being trailed, although the record is wholly devoid of proof from which it could be assumed that Petitioners knew that their pursuers were law enforcement operatives, as opposed to thieves. At all events, it is clear that Petitioners' vehicle drew to a halt in a darkened *cul de sac,* that the vehicle's lights were doused and that Petitioners took to the woods, rather than be confronted by the strangers advancing toward them on foot. The record does not disclose that the Agents identified themselves, or di-

* While fingerprint evidence tended to establish D'Avanzo's presence in the truck, the Government appeared to be unable to adduce any fingerprint evidence connecting Petitioner to the vehicle (Tr. 440-4, 497-9).

rected Petitioners to "halt". There was, likewise, no proof that Petitioners left the keys to the truck in its ignition.

A minute or so after Petitioners had departed, one of the agents climbed atop his own automobile to peer over the side panel of the truck (Tr. 224). The view was unrevealing, so he climbed aboard the side ledge of the truck, leaned over its side walls and peered into the interior of the storage area with the aid of a flashlight (Tr. 312, 397; H. 208, 226-227). The agent then spied a number of exposed mercury cylinders obtruding from a tarpaulin (Tr. 312-313; 397).

Later that night, Petitioners were separately arrested on the main street of Watertown for disorderly conduct with the apparent connivance of the federal Agents. These arrests were determined by District Judge Zavatt to be unlawful.

Petitioners' truck was kept under guard throughout the night and the following day an inventory of its contents showed that 326 cylinders of mercury had been recovered. It was later determined that the truck in which the mercury was found had also been stolen (Tr. 548-566; 583-8; 597-600; 637-640).

Neither petitioner testified at the suppression hearing or trial.

Reasons for Granting the Writ

I. The Decisions of the Court of Appeals and the District Court on the Issue of Abandonment are Clearly in Error and Conflict with Cases Decided in this Court.

It is significant that the decision of the Court of Appeals impliedly rejects the explicit conclusion of the trial court that probable cause existed for the search which took place in the minutes immediately after Petitioners left the

scene. In this connection, the Court of Appeals affirmance is placed squarely upon the ground that the District Court's finding of an abandonment at the moment of the primary search was "not clearly erroneous" (App. B). Significantly, this somewhat backhanded endorsement of the District Court's "abandonment" holding omits any argument that probable cause existed for the primary search conducted when an agent of the F.B.I. first climbed aboard the truck to peer, with the aid of a flashlight, into its obscured and shielded interior. This is made perfectly clear by the language employed by the Court of Appeals indicating that the so called "plain view" discovery first made by the agents was the factor which itself provided "probable cause" for a fuller search on the following day.

It being apparent that the decision of the Court of Appeals rests in the first instance upon the theory of abandonment, we contest that conclusion as being wholly unsupported both in fact and law and as being at odds with existing authority established in this Court.

In the instant case, the search of Petitioners' vehicle occurred within minutes after Petitioners had left the cab of the truck. Significantly, the truck had been first parked by them. It was not left in the middle of the roadway. The vehicle's headlights were extinguished as the pair removed from the area. No ignition keys appear to have been left behind. There was absolutely no proof establishing that Petitioners were, or should have been aware, that it was law enforcement officers, as opposed to thugs, who had been in pursuit. The record is also devoid of proof that the officers either made their identity known or instructed the Petitioners to halt.

The totality of facts hardly disclosed that Petitioners had wholly and irrevocably divorced themselves from any interest in the vehicle within those first few minutes after which the agents effectively searched and seized their vehicle and its contents. (Cf. *Abel* v. *United States,* 362 U.S. 217, 234-235).

In the *Abel* case, the defendant, upon his arrest, had cast certain unwanted objects into a trash can in his premises while packing together and retaining those items in which he purported to claim an interest. As to the former items, this Court observed that Abel's conduct evidenced a clear intention that they be "thrown . . . away" (*id.* p. 241). In the instant case, no such affirmative act of rejection or disclaimer of an interest in property occurred.

The expressed reliance of the Court of Appeals on its own test as set forth in *United States* v. *Cowan,* 396 F. 2d 83, is also open to serious doubt. According to *Cowan* the proof establishing an abandonment "must be direct or affirmative or reasonably beget the *exclusive* inference of the throwing away" (id. p. 87; emphasis added). We contend that the facts established both at the suppression hearing and upon the trial herein hardly gave rise to "the exclusive inference" of abondonment required by the *Cowan* case.

The opinion of the Court of Appeals is likewise open to serious attack insofar as it conflicts with this Court's decision and opinion in *Coolidge* v. *New Hampshire,* U.S. , dec. June 21, 1971, 9 Cr. L. 3208. In the instant case, the Court of Appeals relies upon a finding that the "plain view" observations of the agent who first saw the partially covered mercury cylinders became the probable cause predicate for the full search which took place on the

day following the seizure of the truck. This rationalization "for the more thorough search which was conducted on the following day" overlooks the rule recently expressed in *Coolidge* that no "plain view" observation can result in a lawful seizure unless the primary intrusion upon the affected property is itself in accordance with law. Moreover, the "plain view" observation has to have been "inadvertent" in nature, following upon a lawful presence and cannot be the result of a direct and premeditated hunt for specific property the nature of which is antecedently known to the authorities. The *Coolidge* case likewise stands for the proposition that:

> "The word 'automobile' [here, a truck] is not a talisman in whose presence the Fourth Amendment fades away and disappears". (*id.*, 9 Cr. L., 3214).

The requirement that "exigent circumstances" attend a warrantless search of a vehicle is thus given strong and renewed recognition by this Court (*id.*, at p. 3216). Manifestly, in a case such as this, where the vehicle was for all intents and purposes under the *de facto* control of F.B.I. agents from the beginning, disregard of the warrant requirements of the Fourth Amendment was improper. As stated in *Coolidge*, (9 Cr. L., at 3216):

> "But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless search as 'per se unreasonable' in the absence of 'exigent circumstances'."

In the light of this Court's recent decision in the *Coolidge* case, the observation of the Court of Appeals that *Chambers* v. *Maroney,* 399 U.S. 42, relaxed the warrant requirements of the Fourth Amendment in this case was wholly mistaken. As respects both the search which took place when Petitioners fled and the fuller search carried out the following day, the agents acted beyond the purview of law in proceeding in each instance without a search warrant.

II. The Court's Charge was Patently Defective in its Treatment of the Issues of Guilty Possession as it Related to Petitioner Falcone's Status as an Alleged Aider and Abettor. Moreover, Proof of Guilty Knowledge and Possession was Insufficient Under All Counts.

Under each of the three counts given by the trial court to the jury for deliberation, petitioners were charged not only as principals, but as aiders and abettors (18 U.S.C. § 2; see Indictment, Counts 1, 2, 3). From the form of the indictment, however, it is not clear whether these were assignments of double responsibility for each petitioner or alternative possibilities of guilty status depending upon the ultimate relationship shown by the proofs to have existed between the petitioners.

Considering the fact that petitioner Falcone had not been seen driving the International dump-truck, did not control its operation; that his fingerprints appeared nowhere on this vehicle or in relation to its driving apparatus, that Falcone had not been observed loading the vehicle or even looking into its storage area; and that the vehicle was never placed at his place of business or home, the premise that Falcone might have been no more than an aider and abettor should not be lightly dismissed. It is against this

background that the trial court's charge relating to guilty knowledge on Falcone's part is to be viewed, for the instructions on this subject failed completely to take up the issue of inferred knowledge in relation to one who may be no more than an aider or abettor.

Despite the nature of the proofs limiting petitioner Falcone's apparent complicity, and notwithstanding the aiding and abetting reference made in each count of the indictment, the trial court instructed on the issue of guilty knowledge only in relation to the inference which might be drawn against a *principal* by reason of his unexplained possession of recently stolen goods (Minutes, Sept. 29, 1970; Court's Charge, pp. 21-25). No effort was made by the trial court to deal with the problem of inferred guilty knowledge as it might relate to a defendant appearing to be solely in the status of an aider and abettor. This omission was crucial since the rule permitting an inference of culpable knowledge respecting the origin of recently stolen goods is not applicable where a defedant's guilt is made to rest solely on an aiding and abetting thesis (*Pearson* v. *United States*, 6 Cir. 1951, 192 F. 2d 681, 692-3; *Barfield* v. *United States*, 5 Cir. 1956, 229 F. 2d 936, 943, Fn. 5; *Johnson* v. *United States*, 8 Cir. 1952, 195 F. 2d 673). In such a case, the defendant's guilty mental state cannot be established except by proof of knowledge or behavior on the abettor's part actually evidencing recognition of the tainted origin of the items in question.

The authorities indicate that the inference of guilty knowledge comes into play only where the defendant has "possession" of the recently stolen goods (id.). Significantly, the cases likewise establish that mere presence at

the scene of a crime, or even presence upon, or inside, the stolen object will not, by itself, establish the basis for knowing and guilty possession (*Johnson* v. *United States*, supra, 675-6; 22 C.J.S. § 886(3), 160). Thus, in prosecutions under the Dyer Act (18 U.S.C. § 2312—Count 2 herein) it is well established that mere presence as a passenger in a stolen motor vehicle is insufficient to trigger the rule permitting an inference of guilty possession (*Fitzpatrick* v. *United States*, 5 Cir. 1969, 410 F. 2d 513, 515-6; *Allison* v. *United States*, 10 Cir. 1965, 348 F. 2d 152; *Barfield* v. *United States*, 5 Cir., 1956, 229 F. 2d 936, 939-41; *Johnson* v. *United States*, supra).

In the instant case, no effort whatsoever was made by the trial court to define the ingredients which constituted "possession" of the stolen vehicle or mercury as it related to petitioner Falcone, a passenger whose conduct evidenced absolutely no dominion or control over the stolen International truck. Such vehicle, it will be remembered, started out from a premise at which D'Avanzo alone was said to have been employed (Charge, p. 22). In this connection the court simply charged: (id.)

> "There is evidence . . . in this case from which if you believe it you can find that both defendants were in this truck during the entire trip from Staten Island to Watertown, Connecticut and *were in possession of the truck and its contents* . . . ." (emphasis added).

Based upon the authorities cited above, this instruction was wholly inadequate to define the concept of possession as it bore upon petitioner Falcone. While counsel for Falcone interposed no exceptions or requests on this score, or specifically in relation to the aiding and abetting feature of

our argument above, we urge that the deficiencies and omissions in the court's charge as noted by us constitute plain error affecting substantial rights of petitioner Falcone (Fed. Rule Crim. Proc. 52(b); see also *Barfield* v. *United States,* supra, 229 F. 2d 936, 940-1). In this connection, it should not be overlooked that trial counsel for Falcone did move at the end of the government's direct case (Tr. 687-8) and at the conclusion of the entire case (Tr. 689), to

> "dismiss the indictment and each count thereof on the ground that the government has failed to make out a case; that the government proof at best would clearly show that—if credited, that the defendant Falcone was a passenger in a truck containing allegedly stolen matter . . . and that is inadequate and insufficient as a matter of law to make out a case against him.".

The common problem affecting all three counts under which petitioner Falcone was convicted is the issue of "possession" of the 1969 International truck. Unless Falcone possessed this vehicle in a sense indicating dominion and control over its operation and direction, he could not be guilty under Count II for transporting a stolen vehicle in interstate commerce. As shown, mere status as a passenger is not coequal with possession and control of a vehicle sufficient to establish responsibility for its illegal interstate transportation. By a parity of reasoning, mere presence as a passenger in a vehicle carrying stolen mercury could not supply the ingredient of inferred knowledge of theft, which was a vital requirement under Count I. Finally, if petitioner Falcone lacked sufficient dominion and control to be culpable under the Dyer Act for transporting a stolen vehicle

in interstate commerce, he was, *a fortiori,* incapable of guilt for transporting the vehicle's contents for, as he did not legally "possess" the vehicle, he could not "possess" its contents.

In sum, we urge that proof of petitioner Falcone's guilt under each count of the indictment was insufficient in law, and that the court's charge was so defective in relation to the matters discussed herein as to have required, as to Falcone, a reversal of his conviction upon each count, and either the dismissal of the indictment, or a new trial.

III. The Prosecutor's Summation Statements Relating to the Failure of Petitioners to Explain Their Alleged Possession of the Stolen Truck and Mercury Was Necessarily Taken by the Jury to be a Comment on the Failure of Both Petitioners to Testify.

As indicated above, neither petitioner took the stand in his own defense. That feature of the case, unfortunately, became the subject of repeated comment by the prosecutor —both directly and indirectly, during the course of his summation (Tr. 795, 801, 802). It appears that the ostensible excuse for these damaging references was in some way related to the legal proposition, which the prosecutor sought to convey to the jury, that *unexplained* possession of recently stolen property gives rise to an inference of knowledge of the tainted origin of such property. We complain, however, that the prosecutor's repeated argument in summation along this line exceeded the limits of proper comment, that his multiple and extended references improperly usurped the court's function to explain this feature of the case in a balanced and careful fashion which would give proper protection to the countervailing right of each petitioner to be spared reference to his silence in court. Beyond

this, an examination of the prosecutor's remarks discloses that his comments went far beyond mere observations regarding the absence of proof tending innocently to explain the alleged possession of both the International truck and the mercury. His statements referred directly to the failure of the "defendants" to supply exculpatory proof. Finally, all of the references of the prosecutor neglected to observe that one in the position of a mere aider and abettor was under no obligation whatsoever to rebut an inference of guilty knowledge. As indicated in paragraph heading I herein, petitioner Falcone's position in this case, on the evidence and in view of the indictment itself, was not necessarily that of a principal against whom the inference of knowledge could operate.

For the convenience of the Court, we set forth the offending references which we contend deprived Falcone of a fair trial. In each instance, objection by counsel was timely made and the error having been brought to the trial court's attention should have been—but was not corrected.*

> "Mr. Lynch: Have we heard any evidence that the defendants subsequently went up to Watertown, Connecticut to claim the mercury in the truck?" (Tr. 795)
>
> • • •
>
> "Mr. Lynch: In connection with a certain charge that you Judge will deliver to you, ladies and gentlemen, unless there is a . . . *unless the defendants' advance information* you are satisfied with as an ex-

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* We proceed on the ground that objections tendered by one defense counsel inured to the benefit of the other in light of the trial court's treatment of the objection indicating that duplicated objections would have been fruitless (*United States* v. *Lefkowitz*, 284 F. 2d 310, 313, Fn. 1).

planation that is consistent - - ". (Tr. 801, emphasis added).

• • •

"Mr. Lynch: I submit to you ladies and gentlemen that the *defendants haven't advanced* any explanation consistent with innocence about the possession of this mercury or this truck." (Tr. 802, emphasis added)

The foregoing comments, to which counsel interposed vigorous objections, were of such a character that the jury naturally and necessarily took these as a comment on the failure of both petitioners to testify (*Doty* v. *United States*, 10 Cir. 1968, 416 F. 2d 887, 889-891; *Desmond* v. *United States*, 1 Cir., 345 F. 2d 225; see also *United States* v. *Nolan*, 10 Cir. 1968, 416 F. 2d 588, 593-4). This is especially so where explanatory evidence of innocent possession could have come only from the petitioners (*Desmond* v. *United States, supra.*, and see *Doty* v. *United States, supra*, 416 F. 2d 889-90). Indeed, the "defendants" were explicitly accused of having failed to put forward such evidence in court.

Since proof of petitioner Falcone's guilt was hardly overwhelming, and speculative at best, the comments of the prosecutor were not "harmless beyond a reasonable doubt" (*Chapman* v. *California*, 1967, 386 U.S. 18, 24). Accordingly, petitioner Falcone was entitled to a mistrial.

IV. The Trial Court Improperly Advised the Jury that Statements of the Petitioners Made to the Watertown Police Had Been Suppressed. The Court's Remarks in this Regard Strongly Implied that Such Statements Had Been Inculpatory.

It will be recalled that, as a result of a suppression hearing conducted prior to trial, the District Court ruled that the arrest of each petitioner by the Watertown police was

unlawful and that all evidence, including statements of the petitioners to the local police following upon their arrest would be suppressed (Tr. 339-40; see also Minutes of Court's Ruling, Sept. 21, 1970, Z1-Z10). In a flagrant and unprovoked breach of both the letter and spirit of his own ruling in this regard, the trial court subsequently—and in the presence of the jury—gratuitously remarked that statements of the petitioners taken by the Watertown police after their arrest were not admissible at the trial (Tr. 537-8). The court's statement necessarily conveyed to the jury the fact that the defense had objected, prior to trial, to the admission of cerain incriminating evidence and that the court had conducted a hearing and had ruled against the admission of the damning evidence. Whatever good had been accomplished for the defense by the outcome of the pre-trial hearing was, accordingly, swept away.

The highly prejudicial gaffe occurred in the following fashion. The Government, on its direct case, had brought out the fact that both petitioners had been arrested for disorderly conduct by the Watertown police (Agent Hayes, Tr. 314; Ptl. Kennedy, Tr. 461; Sgt. Esso, Tr. 537). At one point in the direct testimony of Patrolman Kennedy regarding petitioner Falcone's arrest, the latter's trial counsel, quite properly, requested an instruction to the jury that Falcone's arrest at that time was "illegal" (Tr. 538).

The defense was surely enitled to have the jury know that Falcone's presence abroad the streets of Watertown at 5 A.M. was not an unlawful act. It would have been wholly unfair to leave the matter in such a fashion as would have the jury believing that Falcone had been quite properly arrested and was, therefore, guilty of violating Connecticut

law. The trial court was not prepared, however, to allow the defense to clarify this matter and remove it from the case entirely as a feature which might have some influence upon the overall question of guilt or innocence. Therefore, instead of complying with defense counsel's entirely proper request for a ruling, the trial court delivered what can only be interpreted as a premeditated *coup de grace* (Tr. 463-4). Accordingly, the trial judge stated. (Tr. 538)

> "The Court: I must tell you, ladies and gentlemen, that I conducted a pretrial hearing and I ruled that if a person is running down the street or is walking on the street at 5:00 o'clock in the morning, or 3:00 o'clock in the morning, that I do not think that is a crime or disorderly conduct, and therefore when both of these defendants were arrested on that charge by the Watertown police *that any statements that may have been made by either of these defendants after they were placed under arrest would not be admissible on this trial.*" (emphasis added)

Immediate objection and a motion for a mistrial was interposed, to no avail (Tr. 538-9). Matters were worsened when the trial court reinforced the idea that a suppression hearing had been conducted to keep out incriminating matter, by stating: (Tr. 539)

> ". . . [the suppression hearing] was held for the purpose of determining whether any evidence, if any, following the arrest could be admitted . . . ."

This second ill-considered remark could only have caused the jury to wonder why a pretrial hearing had been held at all, if it was not for the purpose of keeping out statements which could have incriminated the petitioners. The court's utilization of the words ". . . whether any evidence, *if any*

. . ." did not avoid the prejudice. Again, why have a pre-trial hearing to suppress unless the defense was bent on keeping out of evidence some damning testimony? Appellate courts regularly give credit to juries for employing common sense and not being easily taken in. Any juror worth his salt could not but conclude that petitioner Falcone had given a statement to the local police which had been kept out of evidence on some technicality relating to the impropriety of his unlawful arrest for disorderly conduct.

It is reversible error for a court to make known to the jury his *in camera* rulings where the disclosure of such rulings tend improperly to influence the jury's view of the evidence in the case, and the opposing positions of counsel (*United States* v. *Costner,* 359 F. 2d 969). Where the effect of advising the jury of the court's private ruling is also to generate spectres of the existence of forbidden proof, the prejudice to the defense is clear (*Garris* v. *United States,* D. C. Cir., 390 F. 2d 862; *People* v. *Cagle* (Illinois) 244 N.E. 2d 200). In the instant case, the trial court's utterances injected a prejudice into the case which was substantial and quite likely affected the verdict against petitioner Falcone.

CONCLUSION

For these reasons, the writ of certiorari should be granted.

Respectfully submitted,

MAURICE EDELBAUM
230 Park Avenue
New York, New York 10018
Attorney for Petitioner
Vincent Anthony Falcone

Of Counsel:

LAWRENCE K. FEITELL
1450 Broadway
New York City, New York 10018

APPENDIX A

Judgment of Affirmance of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of June one thousand nine hundred and seventy-one.

Present:

HON. IRVING R. KAUFMAN,
HON. ROBERT P. ANDERSON,
HON. WALTER R. MANSFIELD,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEWIS VINCENT D'AVANZO AND VINCENT ANTHONY FALCONE,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

Appendix A—Judgment of Affirmance of the United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX B

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 961, 962—September Term, 1970.

(Submitted May 26, 1971 Decided June 9, 1971.)

Docket Nos. 71-1012, 71-1029

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

LEWIS VINCENT D'AVANZO and
VINCENT ANTHONY FALCONE,

Defendants-Appellants.

Before:

KAUFMAN and ANDERSON, *Circuit Judges,* and
MANSFIELD,* *District Judge.*

Appeals from convictions after a jury trial in the United States District Court for the Eastern District of New York, before Joseph C. Zavatt, *District Judge,* for possessing mercury cylinders stolen from an interstate shipment, 18 U.S.C. §659, transporting a stolen truck in interstate commerce, 18 U.S.C. §2312, and transporting stolen mercury in interstate commerce, 18 U.S.C. §2314.

Affirmed.

* Of the United States District Court for the Southern District of New York, sitting by designation.

Appendix B—Opinion of the United States Court of Appeals

MAURICE EDELBAUM, New York, N. Y. (Lawrence K. Feitell, of counsel), *for defendant-appellant Falcone.*

EVSEROFF, NEWMAN & SONENSHINE, Brooklyn, New York (William Sonenshine, of counsel), *for defendant-appellant D'Avanzo.*

MERVYN HAMBURG, Attorney, United States Department of Justice, Washington, D. C. (Edward Neaher, United States Attorney, Eastern District of New York, on the brief), *for plaintiff-appellee.*

PER CURIAM:

Appellants were convicted by a jury and subsequently sentenced under three counts of a four-count indictment, for possessing and transporting in interstate commerce, and in a truck whose cab had been stolen, a quantity of some 326 mercury cylinders which had previously been hijacked. The cylinders were being transported from a pier in Staten Island, New York, where they had arrived by ship in May 1969, to another pier in Brooklyn. The truck from which the cylinders were stolen was recovered the day after the hijacking.

Viewing the evidence most favorably to the Government, as we must at this juncture, *United States* v. *Kahaner,* 317 F.2d 459, 467 (2d Cir. 1963), *cert. denied* sub nom. *Corallo* v. *United States,* 375 U.S. 835 (1963), the proof at trial adequately supported defendants' convictions. Neither defendant was identified as a participant in the thefts either

of the mercury cylinders or of the truck. Shortly after the cylinders (each of which weighed about 100 pounds) had been reported stolen, FBI agent George Moresco observed an International truck cab with a dump-truck type body (open on top) riding low on its axles and thus obviously carrying a heavy load, parked in front of a scrap metal yard on Staten Island. The truck was placed under surveillance and several agents followed it closely as the truck proceeded north from Staten Island via the Connecticut Turnpike to Watertown, Connecticut. During the course of this journey, FBI agent James Hays was able many times to observe D'Avanzo driving the truck and Falcone sitting in the passenger seat.

After the truck entered Watertown at about 2:30 a.m. on June 6, D'Avanzo appeared to be getting ready to turn into a street leading to the Infeld Metal Company but then for some reason changed his mind and proceeded ahead for two more blocks before turning into a U-shaped residential street, Bessamy Avenue,[1] which led nowhere but back to the road upon which the truck had been traveling, Falls Avenue. D'Avanzo parked a short distance down Bessamy Avenue. While several FBI agents remained in another car on Falls Avenue (contiguous to Bessamy), Agent Hays stopped his car short of Bessamy Avenue and walked toward the other FBI vehicle, whose headlights were on. The agents saw appellants leave the truck and walk in their direction for a short distance. But then, as they approached Hays, both turned in the opposite direc-

[1] From among many different versions in the record of the name of this street, we have adopted that form used by the parties in this appeal..

tion and proceeded at a trot into a swampy wooded area behind Bessamy Avenue.

Their retreat prompted Agent Hays to inspect the inside of the truck with his flashlight. The panels were sufficiently high that it was necessary for him to stand on a ledge running around the body of the truck in order to view, through the open top, the exposed interior of the dump truck. Without disturbing a tarpaulin that covered only part of the truck's cargo, Hays was able to observe several exposed cylinders, later identified as part of the stolen shipment of mercury cylinders. Further investigation revealed that the serial number on the motor of the truck corresponded with that of a 1969 flat-bed International truck stolen from the Port Equipment Renting Co. in March 1969. Under a layer of fresh paint on the left door of the cab the name "Port Equipment Renting Co." was still visible.

Prior to the trial, Judge Zavatt conducted a hearing on D'Avanzo's motion to suppress the fruits of the search and seizure of the truck and its contents on the ground that Agent Hays acted without a warrant. After a hearing, Judge Zavatt ruled that the defendants had "abandoned" the truck and its contents prior to Hays's inspection and thus there had been no "search and seizure" within the meaning of the Fourth Amendment to which appellants could object. Whether there has been an abandonment presents a question of intent. Like other factual findings by a district court we may disturb Judge Zavatt's finding that defendants relinquished any interest they may otherwise have had in protecting the privacy of the exposed

portion of the dump truck only if the finding is clearly erroneous. *United States* v. *Cowan,* 396 F.2d 83, 87-88 (1969). Under the circumstances present here we believe Judge Zavatt's finding was not clearly erroneous. Hays's inspection invaded no aspect of the defendants' legitimate interests in privacy. In arriving at this conclusion, we have considered, in addition to defendants' flight into the woods and the attendant circumstances, the minimal intrusion into the truck that resulted from Hays's inspection. We are mindful also that traditionally, as the Supreme Court has recently had occasion to reaffirm, "there is a constitutional difference between houses and cars." *Chambers* v. *Maroncy,* 399 U.S. 42, 52 (1970). After Hays had observed a number of the cylinders in plain view, moreover, probable cause existed for the more thorough search of the truck which was conducted on the following day.

We have examined appellants' other points and find them without merit.

The convictions are affirmed.

APPENDIX C

Minutes of Court's Decision on Denial of Motion to Suppress

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

69-CR-370

UNITED STATES OF AMERICA,

Plaintiff,

—against—

LEWIS D'AVANZO and VINCENT FALCONE,

Defendants.

United States Court House
Brooklyn, New York
September 21, 1970

Before:

HON. JOSEPH C. ZAVATT, *U.S.D.J.*

Appearances:

EDWARD R. NEAHER, ESQ.
United States Attorney
Eastern District of New York
By: JOSEPH LYNCH, ESQ.
Assistant U.S. Attorney

Appendix C—Minutes of Court's Decision on Denial of Motion to Suppress

MESSRS. EVSEROFF, NEWMAN & SONENSHINE
Attorneys for Defendant D'Avanzo
By: WILLIAM SONENSHINE, ESQ.,
of Counsel
—and—
NATHAN KESTNBAUM, ESQ.,
Attorney for Defendant Falcone

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in this proceeding.

EMANUEL KARR
Official Court Reporter
U.S. District Court

(On the morning of September 21, 1970, following a Suppression Hearing in the above entitled matter, the following proceedings occurred.)

The Court: All right, gentlemen.

I am ready to rule on the motion to suppress.

Number one, I might tell all of you that I have studied the transcript very carefully and the memoranda, and of course I read cases on the subject that I am not entirely unfamiliar with, one of the most recent ones is Chambers against Monroney, and here there was a question of searching automobiles—I don't know whether you lawyers have read it, it is fairly recent, it wasn't decided until June 22nd of this year by the Supreme Court, and it is reported in 90 S. Ct. Reporter at Page 1975. Before I get to the question of search and seizure based on probable cause and the

question of abandonment, which does not involve search and seizure, I want to direct my attention to the arrest of the two defendants.

Now the arrest has nothing to do with the search and seizure of what was in the automobile. The arrest occurred a mile or so away from where this truck was left. But there was some testimony that I heard about what one of the defendants said after he had been advised of his rights, after he had been shown a printed form containing the Miranda Warning, the right to counsel and so forth. I think that the defendant was D'Avanzo, was it not?

Mr. Lynch: Yes, Your Honor.

The Court: I think the testimony is that this defendant had a year of college education, he is the defendant, and whoever it was, the local policeman up there in Watertown, Connecticut, had asked him what his education was and he said a year of college, and he then asked him some question about what he was doing up there on Main Street and he gave some answer that was apparently thought to be inconsistent with what he said at Main Street. Then in the transcript I notice that a question was asked by Mr. Sonenshine as to whether any fingerprints were taken, and the Government attorney objected and I sustained the objection because I think I had a right to assume from the facts that the Government was objecting that there was no question of any fingerprints coming up in connection with the motion to suppress. Now I don't know whether fingerprints were taken at Watertown that morning, but if they were, then I don't know why—that is if they are going to be offered—as I say, if the Government should offer them then I wouldn't understand why counsel objected to the question. I would think that the objection was proper if

there were no question of the offering of any fingerprints taken that day.

I can't see any ground for arresting either one of these men for disorderly conduct. I don't think that running down a street at any hour of the morning, even though one is in quite a sweat, constitutes disorderly conduct. As I read the transcript maybe he could have been arrested on some other ground, but neither one of them was, and the amount of bond that had to be put up was so nominal—I don't remember whether it was $35 or $45, I don't remember whether it was either, and that, too, indicates that it was for something as minor as an alleged disorderly conduct. I have never seen the complaint, if there was a complaint, or the inquiry on the station house card, if that is all that is needed to say that, we are arresting him for disorderly conduct.

Nor do I think that if the other defendant, Falcone, was walking on Main Street, even though he could have been lying through his teeth when he said that he had come up for his wife's Buick which broke down a few miles away and that he was on his way to his sister and his sister lived twenty or twenty-five miles south of Watertown—if it is a crime to lie, and I must for the purposes of this motion take the testimony that I have heard, I don't think that is disorderly conduct, I don't think it is disorderly conduct if you are lost somewhere. It could be very suspicious, these two people who have been identified as having been in that stolen truck, and D'Avanzo has been identified as the driver and the other fellow as a passenger sitting alongside of him, yes, very suspicious, and shortly after this truck come to a stop, the lights are turned off, and these two fellows are up on Main Street.

Appendix C—Minutes of Court's Decision on Denial of Motion to Suppress

Now there was nothing that came out at the hearing as to what Falcone said, if he said anything, at the station house.

Is that correct?

Mr. Lynch: That is correct, Your Honor.

The Court: Whatever he said on the street when they said, "Where are you going," and they weren't in custody, that would be admissible on the trial, whatever Falcone said there on Main Street is admissible, but the statement that Falcone made, even though he was given the Miranda warning, I am ruling is not admissible because I don't think that either one of these arrests was a proper arrest for disorderly conduct.

Now as far as the truck and the stolen Mercury, I should say the stolen truck and the stolen Mercury and the stolen truck with the stolen plates, although when it comes to the plates one must consider where the truck was usually quartered and the fact that the theft of the plates was not reported until the 9th, so one might wonder whether the man who owned the truck with those plates loaned it to these fellows, and maybe knowingly, and then, when he found out that they had been caught, six days after the event he reported the plates stolen. But he is not a defendant on trial in this case.

I have gone through the entire record very carefully, I am familiar with the cases on abandonment. I rule that these two defendants abandoned this truck.

Mr. Sonenshine is quite right on the question of probable cause, the Court should know that nobody knew the truck was stolen, that is none of the FBI or the Connecticut officers knew that the truck was stolen, and the fact that the truck was stolen won't be a factor as to whether there was probable cause, but I think it is a factor as to whether these

defendants abandoned this truck. I can draw the inference that they knew this truck was stolen. They knew that the truck had the name Falcone printed on it in white letters, that is on at least one door of the cab; they knew before they left that yard that that lettering had been painted over with red paint.

I have a complete outline of all of the evidence in this case.

I find that this truck was abandoned by these defendants.

I don't know, it may come out on the trial that at the time they got there they knew they were being followed by the FBI, but I suppose having heard Mr. Sonenshine say so then at the trial there probably will be a claim they thought that the truck was being hijacked. If so, they acted quite strangely, instead of running down to the truck and getting into the truck and starting off, they run into the woods and they are found an hour later running up and down Main Street.

It is true that a defendant has standing on a motion to suppress something allegedly unlawfully searched and seized, they do not have to claim a proprietory interest. I am not so sure that the fact that they never did make any claim to the truck or its contents at any time has any bearing on the question as to whether or not they abandoned the truck.

So I deny the motion to suppress the truck and the contents firstly on the ground that there was no unlawful search and seizure, that the truck was abandoned

I deny it on a second ground that under all of the facts and circumstances which have been testified to before me, the Federal Bureau of Investigation had probable cause to believe that this truck—not knowledge, you don't have to have knowledge—that this truck contained the fruits of a

crime, and so I deny the motion to suppress on that ground as well.

We are now ready to proceed to trial.

The Clerk: Shall I call for a jury?

The Court: Yes.

APPENDIX D

Constitutional and Statutory Provisions Involved

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

18 U.S.C. § 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 659 provides in pertinent part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck,

or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

. Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or . . .

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both. . . .

18 U.S.C. § 2312 provides:

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Appendix D—Constitutional and Statutory Provisions Involved

18 U.S.C. § 2314 provides in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . .
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both. . . .

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441-396—71——2

In the Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-22 and 71-44

LEWIS VINCENT D'AVANZO, PETITIONER

v.

UNITED STATES OF AMERICA

VINCENT ANTHONY FALCONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 71-22, App. B; Pet. No. 71-44, App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. No. 71-22, App. A; Pet. No. 71-44, App. A) was entered on June 9, 1971. The petition for a writ of certiorari in No. 71-22 was filed on July 6, 1971; the petition in No.

441-396—71——1

71–44 was filed on July 8, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the circumstances of this case, federal agents could properly look into the open-topped body of petitioners' truck, immediately after it had been parked on a public street and petitioners had fled on foot, in an effort to ascertain the nature of the extremely heavy cargo that was being transported.

2. Whether a comment by the trial judge to the jury regarding his ruling in a pretrial hearing deprived petitioners of a fair trial.

3. Whether the trial court's instructions to the jury were erroneous.

4. Whether certain statements by the prosecutor during his summation were prejudicial.

5. Whether the evidence is sufficient to support the conviction of petitioner D'Avanzo on all counts.

STATEMENT

After a joint trial by jury in the United States District Court for the Eastern District of New York, petitioners were convicted on the first three counts of a four-count indictment, charging them with possessing a quantity of mercury stolen from a shipment consigned in foreign commerce, in violation of 18 U.S.C. 659 (count 1), transporting a stolen truck in interstate commerce, in violation of 18 U.S.C. 2312 (count 2), transporting stolen mercury in interstate commerce, in violation of 18 U.S.C. 2314 (count 3), and concealing the stolen mercury, in violation of 18 U.S.C. 2315

(count 4).[1] On December 4, 1970, petitioner D'Avanzo was sentenced to concurrent terms of imprisonment for ten years under counts 1 and 3, subject to the parole provisions of 18 U.S.C. 4208(a)(2); petitioner Falcone was sentenced to concurrent terms of imprisonment for five years on counts 1 and 3, also subject to 18 U.S.C. 4208(a)(2). On count 2, the sentence was probation for five years as to D'Avanzo and for three years as to Falcone. The court of appeals affirmed *per curiam* (Pet. No. 71–22, App. B; Pet. No. 71–44, App. B).

In May 1969, a ship containing as part of its cargo 400 cylinders of mercury arrived at Pier 20, Staten Island, New York. Each cylinder weighed approximately 100 pounds and was the size of an oxygen tank (Tr. 225–230, 565). On June 3, 1969, a truck laden with the cylinders of mercury was hijacked (Tr. 236). The police were notified and, later that day, they located the truck, now empty, in Brooklyn near the Verrazano Bridge (H. 268). The fuel guage indicated that the hijackers had not driven the truck very far (H. 272; Tr. 240). Accordingly, a number of F.B.I. agents were assigned surveillance duty in the Staten Island area to watch various warehouses and trucking companies (Tr. 254).

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[1] The trial court dismissed count 4 on its own motion at the end of the case (C. 4). "C." refers to the transcript of the court's closing charge, which has been paginated separately from the transcript of trial ("Tr."). The transcript of a pretrial hearing on petitioners' motion to suppress is referred to as "H." We are lodging these transcripts with the Clerk of this Court.

At about 7:00 p.m. on the evening of June 5, 1969, Agent George Moresco observed a large truck, which resembled a dump-truck and had the name "Falcone" written in white on its cab, parked in front of the Caton Scrap Metal Yard. The body was enclosed on three sides but had no top (Tr. 264).[2] The agent noticed that the rear axle was low, indicating that the truck contained a heavy load (Tr. 268).

Shortly thereafter, the truck emerged from the Caton Metal Yard gate; Moresco and other agents followed. At a service station not far from the Goethels Bridge in New Jersey the truck stopped and the driver, later identified as petitioner D'Avanzo (Tr 304),[3] made a telephone call. He then drove north, stopping next at a diner near the George Washington Bridge; he again made a telephone call (Tr. 301). Thereafter D'Avanzo and his passenger, petitioner Falcone, drove across the bridge and proceeded to the Connecticut Turnpike. On the turnpike near Darien, Connecticut, D'Avanzo made another stop at a restaurant. After making a third telephone call, and conversing with an unidentified individual seated in a car and with the driver of a truck which bore the inscription "Infield Metals Company" (Tr. 272, 305; H. 215), D'Avanzo, still accompanied by Falcone, drove the truck to the Bridgeport exit. He there left the turnpike and, still followed by federal agents, proceeded on state roads to Watertown, Connecticut, arriving there at approximately 2:00 a.m.

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[2] As explained below (p. 8 *infra*), at that time, the agent had reason to regard Falcone, a scrap metal operator, as a possible suspect involved in the disposition of stolen mercury.

[3] D'Avanzo was employed at the Caton Scrap Metal Yard (H. 276).

In Watertown, the agents observed the truck start to turn onto the street where the Infeld Metals Company was located; however, it then continued on for a few blocks and turned into a U-shaped residential street, where it was parked. The agents observed petitioners leave the truck and walk in their direction. As they approached Agent James Hays, they stopped, hesitated, and then turned and headed at a trot in the opposite direction into a swampy wooded area (Tr. 311, 571–573).

Agent Hays then drove his car to the truck and parked. Because the side panels were too high for him to see inside from street level, he climbed onto a ledge on the side of the truck and, using a flashlight, looked into the open top. Agent Hays observed that the truck's cargo was largely covered by a tarpaulin; without disturbing the tarpaulin, however, he could see four or five cylinders that were exposed. The agent recognized the unmarked cylinders as a type which usually contained chemicals (Tr. 312–313).

Agent Hays then assigned other agents to remain at the site of the parked truck; he set out to find petitioners. Approximately twenty minutes later, Hays learned from a local policeman, Thomas Kennedy, that Kennedy had just stopped an individual approximately a mile from the parked truck and had asked what he was doing in the area at that time of night. The individual had stated that he was hitchhiking; he had inquired about trains or buses that he could board at that time. When Kennedy replied that there were none, the individual asked for the location of a telephone booth. Kennedy had directed him to a gaso-

line station and had then radioed for assistance in apprehending the individual for disorderly conduct. Hays agreed to assist in the arrest. The two officers proceeded to the service station and Hays helped Kennedy take D'Avanzo into local custody at about 3:00 a.m. (H. 230–233; Tr. 313–314). At this time D'Avanzo's clothes were disheveled, he was perspiring heavily, and his trousers were wet up to the knees (Tr. 321).

Prior to arresting D'Avanzo, Officer Kennedy told Agent Hays that he had also seen an individual fitting the description of Falcone proceeding in the opposite direction (Tr. 468–469). At approximately 5:00 a.m., local police officer Michael Ezzo, who had earlier responded to Kennedy's request for aid and had been given a description of Falcone (H. 49–53), saw Falcone walking. Ezzo noticed that the lower portion of Falcone's trousers were wet (H. 56). He stopped Falcone and asked his name and where he was going. Falcone identified himself and replied that his car had broken down as he was heading toward his sister's home in Westhaven. Ezzo indicated that Westhaven was in the opposite direction. Falcone then said that he was unsure of himself because he had been drinking too much. Although Falcone did not appear to be intoxicated, Ezzo arrested him on charges of intoxication and disorderly conduct, and took Falcone into local custody (Tr. 530–536). This arrest occurred approximately a mile and a half from the site of the parked truck (Tr. 537).

Later that morning F.B.I. agents counted 326 cylinders of mercury in the truck (Govt's Exh. 30;

Tr. 558–560). D'Avanzo's fingerprints were found on the left side of the cab's interior (Tr. 425–450, 484–495; Govt's Exhs. 18–23). The left door of the truck had been freshly painted, and under the paint the inscription "Port Equipment Renting Co." was still visible (Tr. 586–587).[4] The cab portion of the truck had been stolen in Brooklyn on May 9, 1969, while in use by a driver for the Port Equipment Renting Company. At that time it was a flat-bed truck with no dump container attached (Tr. 638–641, 660–668). The vehicle identification number on the door-post also differed from the serial number on the truck motor (Tr. 645–651, 667).

ARGUMENT

1. Petitioners separately challenge the conclusion of the court below that the "search" of the truck was lawful.[5] The viewing of the contents of the truck in Watertown by Agent Hays was not, we believe, a search within the meaning of the Fourth Amendment. The act of climbing onto the side of the truck, which was riding low on its axles and thus was clearly heavily laden, to see what might be exposed to plain view inside the open-topped body is not so unexpected or unusual, nor conducted in such a way, as to be an invasion of privacy. See *United States* v. *Lee*, 274 U.S. 559.

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[4] The name "Falcone", which had appeared in white letters on the cab of the truck when it was first spotted in front of the Caton Scrap Metal yard before the agents began their surveillance, had been removed (Tr. 287, 546, 601).

[5] That argument, however, is foreclosed to petitioner Falcone. He explicitly declined to join petitioner D'Avanzo's pre-trial motion to suppress (H. 9) and never raised the issue in the court of appeals.

A. In any event, there was probable cause for Agent Hays' examination. At the time that he viewed the uncovered cylinders in the back of the truck, F.B.I. agents knew of the hijacking of cylinders of mercury on June 3, 1969; they also know about a similar hijacking eight months earlier. In the period between the two hijackings, the agents, although unable to amass sufficient information to bring charges against Falcone, had gathered credible information that Falcone had been involved in the disposition of the prior shipment of stolen mercury (H. 185–187). When the agents learned of the later theft of mercury, they regarded Falcone as a possible suspect, especially since he operated a scrap metal yard a few blocks from the site of the second hijacking (H. 185). Moreover, the manager of a trucking company located across the street from Falcone's place of business had informed an F.B.I. agent that a week before the second hijacking Falcone had asked the manager whether he handled mercury (H. 272–274). The agents thus had good reason to place under surveillance the dump truck, obviously heavily laden, which, when first observed, bore the name "Falcone" on one side (H. 145, 148).

During its trip to Watertown, Connecticut, the truck was in the sight of one or more federal agents. One agent, who had driven close enough to see the occupants of the truck, described them to the other agents. Agent Moresco, who knew Falcone to be a particularly heavy individual, radioed the others that one of the men just described "sounded very much like Vincent Falcone" (H. 194).

The parking of the heavily-laden truck on a U-shaped street in a residential neighborhood in the early hours of the morning, and the flight of its occupants into the woods, coupled with the prior information about Falcone, justified the finding of probable cause. See *Chambers* v. *Maroney*, 399 U.S. 42, 48.[6] In making this determination, knowledge received by one officer is properly imputable to the others. Contrary to the argument of petitioner D'Avanzo (Pet. No. 71–22, p. 12), it is irrelevant that the inspection of the truck was not personally conducted by the agent who had initiated the surveillance, or by the one who had testified as to the information regarding Falcone's connection with the prior theft of mercury. The agents were acting, not as separate individuals, but as a unit in a common undertaking. *Smith* v. *United States*, 358 F.2d 833 (C.A. D.C.), certiorari denied, 386 U.S. 1008; *United States* v. *Romero*, 249 F.2d 371, (C.A. 2); *United States* v. *Pitt*, 382 F.2d 322, 324–325 (C.A. 4); see *United States* v. *Ventresca*, 380 U.S. 102, 111.

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[6] Petitioner Falcone's reliance on *Coolidge* v. *New Hampshire*, No. 323, October Term 1970, decided June 21, 1971, is misplaced. In the instant case, unlike *Coolidge*, the truck was parked on a public street in a residential area which was clearly not its intended destination; there was every indication that it would be moved again before it was unloaded. It had been driven from Staten Island, New York, to Watertown, Connecticut for what could reasonably be believed to be an illegal purpose. The driver and his passenger, far from being cooperative with the federal agents, fled the scene when the agents approached. Thus, this case is materially different from *Coolidge* on its facts and the decision by this Court in that case is inapposite here.

B. Moreover, as the district court found, petitioners' conduct on their arrival in Watertown, Connecticut, could properly be viewed as manifesting an intent to abandon the stolen truck. The facts that they parked the vehicle in a residential area and ran from the site, that they never mentioned it when confronted by the police officers shortly thereafter but, instead, indicated that they were on the street at that early hour in the morning because they had no available mode of transportation, and that they never subsequently attempted to regain possession of the truck nor admitted any possessory interest in the vehicle, all support the conclusion that they had abandoned it.[7]

In resolving the issue of abandonment, the court's examination is not restricted to the facts known to the officers at the time of the search (Pet. No. 71–22, p. 15). Rather, the critical question is whether the truck was in fact abandoned at that time by its occupants. If so, no rights of privacy under the Fourth Amendment would have been violated, and the situation would not be one calling for the application of an exclusionary rule. The conduct of petitioners in leaving the parked vehicle, and their actions thereafter, would therefore be relevant to determine whether they had manifested an intent to abandon the truck. See *Parman* v. *United States*, 399 F.2d 559 (C.A. D.C.), certiorari denied, 393 U.S. 858.

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[7] Even though the search of the truck occurred prior to the expiration of a period of time which must pass before the State law will regard a parked vehicle as having been abandoned (Pet. No. 71–22, p. 14), that statute was not the controlling standard for determining the issue of abandonment.

2. During direct examination of the police officer who had arrested Falcone in Watertown on a charge of disorderly conduct and intoxication, counsel for Falcone requested the court to charge that the arrest had been illegal.[8] The court complied by stating (Tr. 538):

> I must tell you, ladies and gentlemen, that I conducted a pretrial hearing and that I ruled that if a person is running down the street or is walking on the street at 5:00 o'clock in the morning, or 3:00 o'clock in the morning, that I do not think that is a crime of disorderly conduct, and therefore when both of these defendants were arrested on that charge by the Watertown police that any statements that may have been made by either of these defendants after they were placed under arrest would not be admissible on this trial.

Counsel for D'Avanzo objected on the ground that the court's remark suggested that "there were or might have been statements made by the defendants that Your Honor has excluded" (Tr. 538–539), and therefore it amounted to an unfair comment on the failure of the defendants to testify. In overruling the objection, the trial court pointed out that the hearing had not been held for the purpose of determining the lawfulness of the arrest, but rather to ascertain whether

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[8] At the hearing on D'Avanzo's pretrial motion to suppress, the court had concluded that petitioners' arrests on the streets of Watertown on charges of disorderly conduct and intoxication were unlawful, and that statements obtained as a result of those arrests would be inadmissible (Sept. 21, 1970 Tr. 7).

any evidence following the arrest was admissible (Tr. 539).

Petitioners claim (Pet. No. 71–22, pp. 16–19; Pet. No. 71–44, pp. 17–20) that the court's comment was prejudicial error. We cannot agree. Certainly the court's statement that Falcone's conduct did not justify an arrest for disorderly conduct was not prejudicial to petitioners. Its additional admonition to the jury that any statements "that may have been made" by either petitioner after an unjustified arrest "would not be admissible on this trial" carried with it no implication that incriminating admissions had in fact been made after arrest which were being withheld from the jury.[9]

3. Both petitioners attack what they deem to be omissions in the court's final charge.

A. Pointing to the reference to 18 U.S.C. 2 in each count of the indictment and the absence of evidence that Falcone had driven the truck which had transported the stolen mercury to Watertown, petitioner Falcone now claims fatal error in the court's failure to give an aiding and abetting instruction (Pet. No. 71–44, p. 11). No request to charge on aiding and abetting was made at trial, however, and no objection to the failure to give such a charge was interjected at the close of final instructions. Petitioner is, therefore, foreclosed by Rule 30, F.R.Cr. P., from assigning as error "any portion of the charge or omission therefore." Indeed, here the absence of such a request by Falcone's counsel might well have been an element of strategy, since

[9] The cases cited by appellants are inapposite. Most involve comments by a prosecutor in closing argument to the effect that he has evidence beyond that introduced in the case which would establish the defendant's guilt.

such an instruction would have allowed the jury to consider Falcone's guilt or innocence on a broader theory.

Similarly, petitioner Falcone's trial counsel did not request additional instructions on what constitutes "possession." The failure of the court *sua sponte* to give detailed instructions on this term of common usage does not constitute plain error.

B. Petitioner D'Avanzo argues that he was entitled to an instruction, which he proferred, to the effect that, if the jury found that he had divested himself of the truck that he was driving upon learning that it and its contents were stolen, he should be acquitted (Pet. No. 71–22, pp. 19–23). This request to charge was based upon his counsel's final argument, and upon the proof that he left the truck in Watertown and never returned to it.[10] But D'Avanzo's flight from the truck on seeing the federal agents, and his failure thereafter to return to it, does not indicate that he was unaware of the stolen nature of the property during the long drive to Watertown. Indeed, his several telephone calls in route, and the conversation with two unidentified men at the restaurant in Darien, Connecticut (*supra,* p. 4), suggest otherwise. Thus, the court properly rejected an instruction grounded solely upon an argument of counsel but totally unsupported by evidence. See *United States* v. *DeAlessandro,* 361 F. 2d 694 (C.A. 2), certiorari denied, 385 U.S. 842; *United States* v. *Gosser,* 339 F. 2d 102 (C.A. 6), certiorari denied, 382 U.S. 819.

[10] Neither petitioner presented any evidence at trial.

4. Petitioners also assign as reversible errors certain comments by the prosecutor during his closing argument. The contention is unfounded. Government counsel first outlined his burden of proving every essential element; he then reviewed the testimony of the witnesses, showing how their testimony applied to each count of the indictment (Tr. 752–774). Near the conclusion of his presentation, he referred to the testimony regarding petitioners' separate explanations to the local police preceding their arrests during the early morning hours of June 6 on charges of disorderly conduct. After suggesting that both men had lied to the police, counsel stated rhetorically, "Have we heard any evidence that the defendants subsequently went up to Watertown, Connecticut, to claim the mercury in the truck?" (Tr. 795). Objections to that comment were overruled (Tr. 796).

Government counsel then noted that, during the trial, the jury might have considered the possibility that petitioners were unaware that the truck in which they rode, or its cargo, had been stolen. He then attempted to dispel any such notion by suggesting that transporters of heavy cargo would want to know the nature of their load; and that petitioners, both of whom were involved in the scrap metal and salvage business, would be aware of the value of mercury. After objections to this argument were overruled, counsel made reference to the court's proposed charge regarding the inference of knowledge to be drawn from proof of possession of recently stolen property. The following then occurred (Tr. 800–802):

Mr. Lynch (government counsel): Ladies and gentlemen, the Judge in his charge will instruct you so that you may infer that the mere possession of recently stolen property is guilty possession, unless a satisfactory explanation—

The Court: Why don't you stop telling the jury the judge's job. Not only you, Mr. Kestnbaum and Mr. Sonenshine (defense counsel). My function is to charge the jury as to the law. Don't you tell them in advance what I am going to charge.

Mr. Lynch: Your Honor, I had a comment to make about the charge that I hoped you were going to make.

The Court: Any argument you want to make you make, but do not do it in terms of what I am going to tell the jury.

That is my job.

It is my duty.

Mr. Lynch: In connection with a certain charge that the Judge will deliver to you, ladies and gentlemen, unless there is a——

The Court: Do not state it in terms of what you think I am going to charge the jury.

Mr. Lynch: No, I won't do that. Unless the defendants advance information you are satisfied with as an explanation that is consistent——

Mr. Sonenshine: If the Court pleases, in view of the last remarks by Mr. Lynch, I respectfully move for a mistrial.

The Court: I do not now how many motions you made for a mistrial, but this one is also denied.

Mr. Sonenshine: Exception, if the Court pleases.

> Mr. Lynch: I submit to you ladies and gentlemen that the defendants haven't advanced any explanation consistent with innocence about their possession of this mercury or this truck.
>
> Mr. Sonenshine: I renew my motion and objection.
>
> The Court: Again your motion for a mistrial is denied.
>
> Mr. Sonenshine: Exception.
>
> The Court: When the time comes, ladies and gentlemen, my charge will include a charge with reference to stolen merchandise; if it is recently stolen and found in the possession of a person, what effect may be given and what inferences may be or may not be drawn by the jury.
>
> You will please leave the charge to the Court on this subject as well as any other subjects.

This colloquy demonstrates that the comments by the prosecutor, to the effect that the "defendants" had failed to "advance information" consistent with innocent possession of the mercury, related to the permissible inference that could be drawn from the fact of possession. It plainly was not a comment on the failure of petitioners to testify.

5. Contrary to petitioner D'Avanzo's contention, the evidence is legally sufficient to support his convictions for transporting the mercury and the truck in interstate commerce with knowledge of their stolen nature, and for possession of the stolen mercury. There is no dispute that D'Avanzo drove the stolen truck from

Staten Island to Watertown. Apart from the inference to be drawn from a finding that he possessed the truck and the mercury, the jury could properly have inferred knowledge from his behavior en route (*supra*, pp. 4–5) and his flight in Watertown.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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